

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3137

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEBASTIAN BUSTAMANTE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Door County: JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Sebastian Bustamante appeals an order denying his postconviction motion under § 974.06, STATS. He argues that his trial counsel was prejudicially ineffective for failing to renew an objection to the introduction of “other crimes” evidence after the evidence submitted differed from the evidence described by the prosecutor’s offer of proof at an earlier hearing. Because we

conclude that Bustamante has failed to establish deficient performance or prejudice, we affirm the order denying postconviction relief.

In 1993, Bustamante was convicted of killing his infant son in 1978. In an earlier appeal, this court affirmed the trial court's decision allowing the State to present evidence that in 1989, Bustamante injured another three-month-old baby in his care. Because Bustamante's trial counsel did not object at the time this evidence was presented at trial, did not ask that the testimony be stricken or ask for a mistrial, this court limited its review to the facts stated by the prosecutor at the hearing on the motion in limine. We concluded that those facts were admissible to show the absence of accident or mistake. *See* § 904.04(2), STATS. Bustamante argues that the evidence actually presented at trial differed so substantially from the prosecutor's offer of proof that his trial counsel was ineffective for failing to renew the objection.

To establish ineffective assistance of trial counsel, Bustamante must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and Bustamante must overcome the strong presumption that counsel's performance might be considered sound trial strategy. *Id.* at 689. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Bustamante must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines this court's confidence in the outcome. *Id.* at 694.

Bustamante has failed to establish that his counsel's decision not to renew the objection was an unreasonable strategic choice. After the jury heard the testimony regarding the other infant, counsel's strategy was to undermine that testimony by cross-examination rather than asking that it be stricken. If the testimony had been stricken but a request for a mistrial denied, counsel would have compromised his ability to cross-examine the second child's mother regarding the details of her accusation. Bustamante's trial counsel reasonably believed that it would be difficult for the jury to ignore the stricken testimony and that it would be better to challenge the testimony by cross-examination.

Bustamante also failed to establish prejudice from his counsel's decision. The differences between the actual testimony and the offer of proof were not so substantial as to change the ruling on admissibility. In the offer of proof, the prosecutor stated that the second child's mother would testify as follows:

Laura Alexander will testify that she and the defendant had an argument, that she left to get cigarettes, that when she came back, the defendant would not let her near Bianca. She will also testify that when Bianca sustained the previously mentioned injuries the defendant had sole custody of her, and will state that after Bianca exhibited symptoms such as not breathing and being blue she was taken to the hospital, where it was determined that she had sustained two skull fractures. Ms. Alexander will state that when she discussed Bianca's skull fractures with the defendant, he told her not to tell anyone about them, and also instructed her not to talk to anyone. In addition, Ms. Alexander will testify that the defendant became jealous and would threaten her if she paid too much attention to Bianca, and she will state that the defendant would grab Bianca by the ankle to wake her up.

Alexander's actual testimony differed from the offer of proof in three respects: There was a five-day period between the day of the argument and

the day Bianca was taken to the hospital; the symptoms Alexander noted did not include inability to breathe or turning blue, but consisted of spitting up and “fussing;” and Bustamante’s stated reason for keeping the mother away from the baby was that the child was sleeping and should not be disturbed. While these facts differ from those presented in the offer of proof, they do not alter the conclusion that the testimony was admissible to show the absence of accident or mistake. Alexander’s testimony establishes that Bustamante was jealous of the attention given the infant and had threatened to harm the baby; he was left alone with the baby; he discouraged the mother from seeing the baby immediately after she returned, and the child sustained two skull fractures prior to the hospitalization.

Bustamante contends that he could not have injured Bianca because her mother testified that he had no access to the child for five days before the hospitalization and a doctor testified that the injuries occurred on the same day the doctor examined the child. Other acts evidence is relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. *See State v. Landrum*, 191 Wis.2d 107, 119-20, 528 N.W.2d 36, 41 (Ct. App. 1995). Whether a jury could find a defendant committed another act by a preponderance of the evidence is a question of law the trial court decides without weighing credibility or determining whether the government proved the defendant committed the act. *See State v. Schindler*, 146 Wis.2d 47, 54, 429 N.W.2d 110, 113 (Ct. App. 1988). The evidence presented regarding Bustamante’s involvement in Bianca’s injuries would allow a reasonable jury to find by a preponderance of the evidence that Bustamante injured the child notwithstanding the inconsistencies between the doctor’s testimony and Alexander’s recollection of the time factors.

We conclude that renewing the objection would not have changed the evidence presented in this case. For this reason and because the State presented substantial other evidence that proved Bustamante killed his son, this court's confidence in the outcome of the trial is not undermined by counsel's failure to renew the objection.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

